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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 670

TECON ENGINEERS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 11–25) is reported at 343 F. 2d 943.

JURISDICTION

The order of the Court of Claims (Pet. 26–28) was entered on February 10, 1965. A timely motion for rehearing was denied on July 16, 1965. The petition for a writ of certiorari was filed on October 14, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims, after having properly assumed jurisdiction of a matter, must relinquish it by reason of the filing of an action involving the same subject matter and parties in another court.

2. Whether, assuming the Court of Claims properly retained jurisdiction, it committed an abuse of discretion in dismissing petitioners' suit, with prejudice, after they unqualifiedly advised the court that they would not prosecute their claim further in that court and expressly accepted the risk of a dismissal with prejudice in the event of the denial of their motion to dismiss for lack of jurisdiction.

STATUTE INVOLVED

28 U.S.C. 1500 provides:

> *Pendency of claims in other courts*
>
> The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States * * *.

STATEMENT

During 1962 and 1963, petitioners filed a group of cases in the Court of Claims (subsequently consolidated for trial by agreement of the parties) asking for refund of federal income taxes, fraud penalties and interest on the deficiency in the aggregate amount of $383,544.83, plus interest. At the time of the filing, no suit involving the same subject matter was pending

in any other court. Petitioners actively prosecuted their claim in the Court of Claims for more than two years. They participated in more than thirty separate procedural steps, including stipulations of fact, motions for discovery, pretrial conferences, taking of depositions, various motions and objections to motions, etc. (Pet. 13, n. 1). Five days before the date (February 1, 1965) set for trial petitioners filed in the District Court for the Eastern District of Kentucky complaints based upon the same claims involved in the Court of Claims actions. Simultaneously, they moved in the Court of Claims to dismiss their actions in that court, arguing that under 28 U.S.C. 1500 the filings in the district court automatically deprived the Court of Claims of jurisdiction. They advised the Court of Claims, further, that they would stand on this contention; that if it was rejected they would not go to trial; and that they understood and accepted that this would result in a dismissal of the actions, with prejudice, for failure to prosecute their claims. The Court of Claims, holding that the later filings in the district court did not affect its jurisdiction, denied petitioners' motion and dismissed their actions with prejudice.

ARGUMENT

The decision below is fully consistent with the decisions of this Court governing the jurisdiction of the Court of Claims, and is correct. Moreover, the questions presented do not arise frequently. Accordingly, further review is not warranted.

1. (*a*) The provision denying to the Court of Claims jurisdicion of claims in respect to which there are suits pending in other courts, now embodied in 28 U.S.C. 1500, is intended simply to require an election between suing in the Court of Claims and suing elsewhere. Having chosen another forum in which to prosecute his claim against the United States or its officials, a plaintiff cannot, during the pendency of that suit, file a second suit upon the same claim in the Court of Claims. See *Matson Navigation Co.* v. *United States,* 284 U.S. 352, 355–356; *Calmar S.S. Corp.* v. *United States,* 345 U.S. 446, 455, n. 7; *Glidden Co.* v. *Zdanok,* 370 U.S. 530, 565–566. See, also, Pet. 18. The principles of orderly procedure which underlie Section 1500 would be thwarted by construing the statute to oust the Court of Claims of jurisdiction of a suit properly pending in that court whenever a plaintiff, dissatisfied with the course of such a suit, decided to file another suit upon the same claim in a different court. Had petitioners here initially sued in a different court, they would have been barred from suing on the same claim in the Court of Claims during the pendency of the first action. They elected, rather, to sue in the Court of Claims. Nothing in the policy or terms of Section 1500 supports petitioners' contention that they have an absolute right to revoke their election simply by the later filing of another suit in a different court. The purpose of Section 1500 is to prevent the Court of Claims from taking jurisdiction of a claim already being litigated elsewhere, not to compel that court to abdicate jurisdiction of a case

properly before it simply because the plaintiff decides in the course of the proceeding that he would prefer to press his claim in a different forum.

Not only would the construction of Section 1500 for which petitioners contend invite unnecessary and prolonged litigation against the United States; it would contravene the settled principle that once federal court jurisdiction has attached, it cannot be ousted by later events. *Mollan* v. *Torrance,* 9 Wheat. 537; *Dunn* v. *Clarke,* 8 Pet. 1, 2; *Hardenbergh* v. *Ray,* 151 U.S. 112, 118. In *St. Paul Indemnity Co.* v. *Cab Co.,* 303 U.S. 283, for example, this Court held that the removal jurisdiction of a federal court could not be ousted by the plaintiff's action in reducing the amount in controversy after having filed his suit; removal jurisdiction had attached upon such filing, and was not to be defeated by later events. So here, since petitioners' suits properly invoked the Court of Claims' jurisdiction—there being no other suits upon the same claims pending in other courts at that time—such jurisdiction was not impaired by petitioners' efforts to defeat it by filing suits upon the same claims in another court.

(*b*) Petitioners err in asserting (Pet. 4) that the decision below on the jurisdictional question is inconsistent with *Ex Parte Skinner & Eddy Corp.,* 265 U.S. 86, and *Corona Co.* v. *United States,* 263 U.S. 537.[1] The holding of *Ex Parte Skinner &*

[1] Nor is there any inconsistency, as petitioners assert (Pet. 6–8) with prior decisions of the Court of Claims. In *Brinker-Johnson Co.* v. *United States,* 144 Ct. Cl. 489, the matter with respect to which plaintiff had brought suit in the federal district court was first raised in the Court of Claims in a proposed

Eddy Corp. was merely that a plaintiff had the absolute right to dismiss his petition in the Court of Claims, without prejudice, prior to judgment or the

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amendment to plaintiff's petition several years after the district court suit had been instituted; the Court of Claims properly held that it had no jurisdiction of the proposed amendment, in view of the earlier-filed district court action. *National Cored Forgings Co.* v. *United States*, 132 Ct. Cl. 11, and *British-American Tobacco Co.* v. *United States*, 89 Ct. Cl. 438, certiorari denied, 310 U.S. 627, involved situations where suit had been filed in the district court and Court of Claims simultaneously; in the latter, indeed, judgment on the merits had actually been entered against the plaintiff in the district court action. *Maguire Industries, Inc.* v. *United States*, 114 Ct. Cl. 687, certiorari denied, 340 U.S. 809, was a case where the plaintiff had initiated judicial proceedings elsewhere prior to invoking the jurisdiction of the Court of Claims (see Pet. 24). And although in *Hobbs* v. *United States*, decided December 11, 1964 (Ct. Cl.) (Pet. 30–32), the plaintiff actually filed his petition for review of the order of an administrative board of the Atomic Energy Commission with the court of appeals one day after he filed his petition in the Court of Claims, the Court of Claims properly deemed the two suits to have been substantially simultaneous (Pet. 24)—in contrast to the situation here, where the district court action was filed two years after the Court of Claims action. Moreover, the filing in *Hobbs* of the claim before the administrative board, which was a condition precedent to the subsequent petition for review before the appellate court and with respect to which rights could have been lost if appeal had not been taken, might in itself be deemed the election contemplated by Section 1500. Of course, even if the present view of the Court of Claims were different from that expressed in some earlier decisions, that would not mean that the earlier position was correct or could not be reexamined—especially since, as that court pointed out in this case (Pet. 24), to the extent that any of the earlier decisions support petitioners' contention that the subsequent filing of a similar action in another court ousts the Court of Claims of jurisdiction, "there is no indication that the issue of priority was ever fully briefed, considered or decided" in any of those cases.

filing of a counterclaim.[2] This Court mentioned that a special reason for barring restoration of the action was that plaintiff had filed a State court action with respect to the same matter. But, as the Court noted, that action had been filed at a time when there was no pending suit in the Court of Claims, that court having previously relinquished its jurisdiction by the granting of plaintiff's motion to dismiss.

Corona Co. v. *United States, supra,* did not involve the right of a plaintiff to maintain an action in the Court of Claims, but, rather, his right to appeal to this Court. The predecessor of Section 1500 provided that "No person shall file or prosecute in the Court of Claims, *or in the Supreme Court on appeal therefrom,* any claim" in respect to which he had pending a suit in another court.[3] Judicial Code of 1911, c. 231, § 154, 36 Stat. 1087; emphasis added. Hence, since "[a]fter the rendition of judgment and before the appeal of this Court, appellant brought actions in the Federal District Court," this Court held that it was required to dismiss the appeal (263 U.S. at 539).[4]

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[2] The common law rule relied on in *Skinner & Eddy* that a plaintiff has an absolute right to dismiss his complaint without prejudice at any time before counterclaim or judgment has since been changed in the federal courts by rules (Rule 41, Federal Rules of Civil Procedure; Rule 67(a), Rules of the Court of Claims) authorizing the court to refuse to permit a plaintiff to dismiss without prejudice save under limited circumstances. *Bronx Brass Co.* v. *Irving Trust Co.*, 297 U.S. 230; *Jones* v. *Securities Commission*, 298 U.S. 1; *Federal Savings & Loan Ins. Corp.* v. *Reeves*, 148 F. 2d 731, 732 (C.A. 8).

[3] This provision was omitted from 28 U.S.C. 1500.

[4] In the past, the government took the position that even where the suit in the Court of Claims was filed prior to the

2. The question whether the Court of Claims should have dismissed petitioners' cases with prejudice is one traditionally within the discretion of the trial court, and plainly does not warrant review by this Court. Petitioners actively conducted litigation in the Court of Claims for more than two years and were given more than eight months to prepare for trial (Pet. 12). Failure to prosecute is ground for dismissal with prejudice under Rule 67(b) of the Rules of the Court of Claims, and petitioners' refusal to go to trial clearly warranted the court's dismissal with prejudice here. See *Bronx Brass Co.* v. *Irving Trust Co.*, 297 U.S. 230; *Conway* v. *Union Bank of Switzerland*, 204 F. 2d 603, 608 (C.A. 2). Moreover, petitioners told the court both in writing and orally that, whether or not their motion to dismiss for want of jurisdiction was granted, they would not proceed to trial as ordered, and that they were willing to accept the risk of dismissal of their claims with prejudice rather than proceed to trial (Pet. 12–13, 27–28). The court merely held them to their expressed intentions.

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suit with respect to the same matter brought in another court, the filing of the second suit deprived the Court of Claims of jurisdiction. See *British-American Tobacco Co.* v. *United States, supra*, No. 817, 1939 Term (Br. in Opp. 9); *United States Lines Co.* v. *United States*, certiorari denied, 348 U.S. 942, No. 503, 1954 Term (Br. in Opp. 4). Upon reconsideration of the question, however, the government concluded—and urged the court below (Pet. 33–34)—that where a suit is first filed in the Court of Claims, a subsequent suit in another court with respect to the same subject matter does not deprive the Court of Claims of jurisdiction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1965.

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